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ABSTRACT

There have been four major court decisions affecting bilingual education: Lau v. Nichols, Serna v. Portales, Aspira v. the New York Board of Education and Keyes v. Denver School District No. 1. Lau v. Nichols was an action brought by non-English-speaking Chinese-origin students claiming to be denied an education because they could not comprehend the language in which they were being taught. After two appeals, the Supreme Court found in favor of the students under the 1964 Civil Rights Act, without prescribing a specific remedy. However, in Serna v. Portales the Circuit Court required bilingual education as a solution when a "substantial group" is involved. The decision in Aspira v. the N.Y. Board of Education required testing of students in English and their native language to determine who should receive bilingual education. The Keyes decision specified that students should receive both instruction in English and native-language instruction in other subjects until they are competent in English. It seems clear that school systems must provide non-English-speaking students with special English instruction and that they must give these students an opportunity to learn the other school subjects as well. HEW's Office of Civil Rights has issued guidelines for eliminating illegal educational practices; these involve pupil evaluation and placement in the proper type of language program. (CHK)

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SUPREME COURT OF THE UNITED STATES

Syllabus

LAU ET AL. V. NICHOLS ET AL.

The failure of the San Francisco school system to provide English language instruction to approximately 1,800 students of Chinese ancestry who do not speak English denies them a meaningful opportunity to participate in the public educational program and thus violates §601 of the Civil Rights Act of 1964, which bans discrimination based "on the ground of race, color, or national origin," in "any program or activity receiving federal financial assistance," and the implementing regulations of the Department of Health, Education, and Welfare.

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BILINGUAL EDUCATION AND THE LAW: AN OVERVIEW

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Introduction

In the United States today there are approximately five million school children who are having difficulty in our public schools because they cannot communicate in the language being used to teach them. These children are not defective or learning impaired in any sense. Their difficulty stems from the fact that they come from a background in which English is not a primary language. The exact number of children affected is uncertain. Many are migrants, and many are dependents of illegal aliens. There is still a great controversy as to when a student is functionally bilingual. Guidelines for testing students are being developed and implemented, but only with great reluctance in many areas and the data is not yet completed. Finally new groups of students with language difficulties are still being identified. As always the magnitude of the program grows when people are first becoming conscious of it.

One thing, however, is fairly certain--change will come to this area of education. Since the problem is still not completely defined, the solutions are uncertain. Nevertheless, patterns are beginning to emerge. To see these patterns it is necessary to look to the history of this movement and consider the impetus for change. This course of action leads inevitably into the courts of America. One of the chief instruments of social change has been the court order, such as with the

case of integration. There have been four major court decisions, Lau v. Nichols, Serna v. Portales Municipal Schools, Aspira of New York, Inc., v. Board of Education of City of New York, and Keyes v. School District No. 1, Denver, Colorado. This paper is an attempt to outline the current position of the law in relation to bilingual education and to thereby shed some light on what may be expected in the future.

Lau v. Nichols

The landmark case in the field of bilingual education is Lau v. Nichols. The action originated in San Francisco, California during March of 1970. After four years of litigation it was finally resolved by the Supreme Court of the United States. It is worthwhile to study the struggle in this case from the beginning because it should lay to rest many of the arguments that are posed by those who would resist bilingual education programs and at the same time show that the nature of these programs is still unclear.

The court action was brought by thirteen non-English-speaking Chinese-origin students on behalf of the approximately 3,000 Chinese-speaking students in the school district. The defendant was the San Francisco Unified School District. These students alleged that they were being effectively denied an education because they could not comprehend the language in which they were being taught. It was further claimed that this deprivation of an education

was "dooming these children to become dropouts and to join the rolls of the unemployed." They argued that the failure to teach them bilingually should be prohibited on two legal grounds. First, that not to do so was a violation of their Constitutional right to "equal protection under the law". Second, that it was a violation of the Civil Rights Act of 1964.

The first court to consider this action was the United States District Court in San Francisco. It was here that the magnitude of the problem for these particular students became all too painfully obvious. The suit was not brought as a matter of course, but was a last effort in a long community struggle to have a grievance redressed. Indeed the seriousness of the students' position was admitted by the school district. It was agreed that in 1970 there were 2,856 Chinese-speaking students in the school district who needed some sort of remedial attention and that of these, 1,790 were not getting any help at all. Of the 1,066 who were being helped, 2/3 were getting only special instruction on a part-time basis in the form of a fifty-minute class each day. Furthermore, only 260 of these students were being taught by a teacher who was bilingual and Chinese-speaking. In other words, almost 2,000 children were sitting in class every day comprehending almost nothing of what was being said. Certainly they could not be expected to compete with the children who could understand

English. This was of little surprise to the school district. In 1969 it admitted as much by saying:

> When these (Chinese-speaking youngsters) are placed in grade levels according to their age and are expected to compete with their English-speaking peers, they are frustrated by their inability to understand the regular work . . . For (these) children, the lack of English means poor performance in school. The secondary (student, is almost inevitably doomed to be a dropout and (become) another unemployable (person) in the ghetto.

It is difficult to imagine how the plaintiffs could speak more eloquently for themselves. These surveys, estimates and admissions were made by the school district itself. They are the working considerations of the established educational authorities. These were also not declining figures, but were markers of a growing problem. In April of 1973, a further study adopted by the Human Rights Commission of San Francisco showed that 3,457 Chinese-speaking students were seriously deficient in their use of English and that no more than 1,707 of them were receiving any sort of help. The problem was continually growing and had been with the San Francisco community for decades, largely ignored and clearly unresolved.

When confronted in District Court, the school district argued that these students were not being discriminated against. The reasoning used was that they were being taught in the same facilities and by the same teachers at the same time as every one else. Thus, since everything was the

same for all students, there was no discrimination, and therefore, no violation of anyone's right to equal protection. In effect, their position was that the schools had no obligation to recognize and respond to the demonstrable communications difficulties encountered by these non-English-speaking students.

The District Court ruled in favor of the school district, agreeing that all that was required was equal access to the school facilities and not the opportunity to derive equal benefits from such access. To quote the court, "they received the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District." Another point repeatedly stressed by the court was that this problem was of recent origin and had been caused by a large influx of Chinese immigrants between 1965 and 1970. There was indeed an increase in the number of immigrants in recent years; however, the school district's own records had shown that the problem had existed for years and had shown no signs of ceasing to exist.

Clearly, the trial court's decision was unacceptable to the students involved. They appealed to the United States Circuit Court of Appeals for the Ninth Circuit. They made the same arguments, offered the same justifications and asked for the same relief. The Circuit Court chose to affirm the decision of the District Court. This decision was handed down on January 8, 1973. The Circuit Court

accepted all of the District Court's rationales for the decision. They did, however, go on to make some observations on the cause which were even more unfavorable to the students. As the plaintiff's counsel Edward H. Steinham notes, "the court callously observed that the problems suffered by the children were not the result of laws enacted by the State. . . but the result of deficiencies created by the (children) themselves in failing to learn the English language." The court also observed that:

> Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and contributed completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to a 'denial' by the (school district) of educational opportunities. . . should the (district) fail to give them special attention.

The students after hearing the decision of the Circuit Court took the last step and appealed to the Supreme Court. Here finally they received some satisfaction for their efforts.

First, the Supreme Court laid to rest the argument that equal access to the facilities provides equal treatment and equal educational opportunity. To quote the Court:

> Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that before a child can effectively participate in the educational program he must already have acquired these basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.

Having provided a reason for its actions, the Court went on to clarify the grounds for the decision. The decision was not based on a Constitutional requirement. In fact, it expressly does not even consider that argument of the plaintiffs. Instead, the entire rationale is provided by §601 of the Civil Rights Act of 1964. That section reads as follows, "No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." This section was a mandate by Congress to make sure that federal monies were spent in a non-discriminatory fashion.

The government groups involved were also given, by §602, the right to make decisions as to how the funds should be spent and to design adequate safeguards in order to protect the funds from misuse. Thus, the government agencies are empowered to issue reasonable guidelines which must be complied with. If compliance is not obtained, then the federal agency can withhold these funds. The Court went on to clarify the term discrimination by saying that it was something which has a discriminatory effect even though no purposeful design is present.

The reasoning was perfectly applicable in this case since the school district was the recipient of a large sum

of federal funds. By accepting these funds, the School district had contractually agreed to all the regulations of the Department of Health, Education, and Welfare, which were issued pursuant to §601 and §602 of Title VI of the Civil Rights Act of 1964. They also had agreed to take any measure necessary to implement the agreement. The School district was clearly not complying with a validly imposed regulation.

The Supreme Court did not, however, grant the students all that they requested. The court did not specify the course of action to remedy the problem. The plaintiffs had asked for bilingual teachers and for all subjects to be taught bilingually. The decision did not grant this request. Instead, it sent the case back down to the District Court where they were to decide on "appropriate relief." By choosing to base their opinion on a statute rather than the Constitution, the Court restricts the remedies for making sure that bilingual education be established throughout the country. Under this decision, a school district which accepted no federal money would be exempt from these federal agency guidelines as the district had not contractually agreed to anything.

Another limiting facet of the decision was the separate concurring opinion of Justice Blackmun. Blackmun agreed that in this instance the need for remedial help was clear; however, he went on to say:

> ...that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision or the separate concurrence as conclusive upon the issue whether the statute and the guideline require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.

Obviously this does not provide a clear guide as to when the number of affected students is small enough to become insignificant under this opinion. Consider also that this decision passed unanimously while the caveat on the number of students which must be affected was endorsed by only two of the justices. It is quite possible that the majority of the court would require a plan of affirmative action by the School district no matter how small the number of affected students.

Serna v. Portales

The impact of Lau was tremendous, but what exactly does it mean? What is now going to be required that wasn't required before? Since the Supreme Court did not prescribe a specific remedy, leaving that task to the District Court, it is necessary to look to the lower court decisions which have been issued since the Lau ruling.

The first of the cases was Serna v. Portales Municipal Schools which was decided on July 17, 1974. This was a case which all parties concerned admitted was exactly like Lau. Therefore the Circuit Court simply followed and inter-

preted the language of the Supreme Court in reaching a decision. This decision is interesting in its discussion of three areas: what constitutes an acceptable remedy, who can propound such a remedy and when such a remedial program will be required. The first question of what is an effective remedy is answered by the court saying, "A student who does not understand the English language and is not provided with bilingual instruction is therefore effectively precluded from any meaningful education." This is the first instance of a court expressly requiring bilingual education as such.

The question of who could propose a remedial bilingual education plan was raised when the New Mexico State Board of Education and the appellants argued that the trial court's decision to impose a particular plan of instruction constituted an unwarranted and improper judicial interference in the internal affairs of the school district. The Court replied that:

> ...'(once) a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.' ...Under Title VI of the Civil Rights Act of 1964 appellees have a right to bilingual education. . . .we believe the trial court, under its inherent equitable power, can properly fashion a bilingual-bicultural program which will assure that Spanish surnamed children receive a meaningful education.

Thus, the authority of a court to prescribe a curriculum is clearly established. It is important to know that in this case the plan upheld was not completely bilingual. It con-

sisted of having special periods set aside each day for bilingual-bicultural instruction.

The third area explored was when a program would be required. This court followed the reasoning of Blackmun in saying that numbers are the heart of the case. Unfortunately, there is still no real explanation of when the numbers will be so few as to obviate the need for the program. The Court says, "only when a substantial group is being deprived of a meaningful education will a Title VI violation exist." The question remains, what is a substantial number?

Aspira v. Board of Education

The next important lower court decision is Aspira of New York, Inc. v. Board of Education of City of New York. This case was concerned with problems in determining who was entitled to receive special bilingual instruction. After all, it is one thing to say that those students who are having difficulty should be helped, but it is a much more detailed problem to determine who needs the most assistance. The question is important not only in determining the size of the program, but also in determining its quality and substance. The type of testing done to find out who will participate in the program is in many ways a guide to what the program will be like. The United States District Court of New York fully realized this when it ruled on the Aspira controversy.

The court did not address the merits of the various tests

being used. It did say that all students should be given a test to determine their proficiency in the use of the English language. Those students who fall below the twentieth percentile and who come from an Hispanic background should be given another test to determine their proficiency in Spanish. If their percentile score in Spanish is higher than in English they should receive bilingual instruction. Some of the specific language of the court is quite illuminating in reference to the court-perceived goals of bilingual education. First the court comments:

> As has been noted, the assertedly "ideal" view of plaintiffs - to test all Hispanic students in Spanish and give the bilingual program to all who do better in Spanish than in English - is not accepted. In addition to the reasons noted earlier, we may observe that the decree is not meant to enroll for bilingual instruction all who are more fluent in Spanish than in English. The setting and the goal remain a course of English language instruction so those who can now participate "effectively" in English are outside the plaintiff class, whatever their relative fluency in Spanish might be.

Thus, the court has said that all students who score above the twentieth percentile in English are presumed competent in English and therefore need no bilingual help and are entitled to none. Further the court says that those scoring below the twentieth percentile are entitled to receive help if and only if their Spanish capability is greater than their English capability. It should also be pointed out that the court was well aware of the limitations of this procedure. They simply observed that as of yet nobody has

designed a better system for distinguishing those who do and do not need a special language program to make possible a meaningful education.

Keyes v. School District No. 1

The final major court decision is Keyes v. School District No. 1, Denver, Colorado. The Keyes decision was not primarily concerned with bilingual education. The case came about because of the segregated school zones in Denver and was eventually decided by the United States Supreme Court. As in the Lau case the Supreme Court remanded the case to the District Court in order that a remedy might be developed. It is from this District Court opinion handed down on April 8, 1974 that the relevant language comes. As part of the program for desegregation an education specialist, Dr. Cardenas, designed special classes for Chicano students who were having difficulty learning by using only English. The court elaborates saying:

> One educational element called for by the proposed Cardenas plan is the utilization of bilingual training, particularly in the low elementary grades. Currently many elementary school Chicano children are expected not only to learn a language with which they are unfamiliar, but also to acquire normal basic learning skills which are taught through the medium of that unfamiliar language. Some provisions for effecting a transition of Spanish-speaking children to the English language will clearly be a necessary adjunct to this court's desegregation plan.

The court went on to praise and adopt the Cardenas plan. This opinion is important in that it goes beyond just saying that these children must receive bilingual instruction in

English. It seems to further require that the students also receive instruction in other subjects in their native tongue, until they can effectively compete in English.

Another interesting facet of this case has to do with the relationship of bilingual education to integration. In formulating the integration program in this case the court allowed two schools to remain predominantly Spanish-surname in composition. This was in response to the express wishes of the Spanish-speaking community. The purpose of this continued segregation was to allow for a more efficient and effective implementation of a bilingual education program. This continued segregation was only to be temporary. Still, the decision is fairly unusual in that it seems to allow segregation if that will significantly further the ability of the schools to provide a meaningful education. It must also be remembered that the minority was the group petitioning for this continued segregation.

Summary

Having considered the major court decisions touching upon the educational rights of non-English-speaking children, it is time to ask what conclusions can be drawn.

First, without any doubt the public schools are going to have to institute programs which will provide non-English-speaking children with some sort of meaningful education. These programs must be designed to teach these children to

read, write and speak English. They must also give the student some opportunity to learn the subjects being taught to the monolingual English-speaking students. This latter requirement is found in the Keyes decision. Interestingly, the Lau decision does not require any specific program. Bilingual education has not been specifically mandated by the Supreme Court. However, every court which has approached the problem of providing a meaningful education to the non-English-speaking student has concluded that some form of bilingual education is necessary.

This brings up the second point. The courts have not required that students be taught or even be provided classes in their native language. What is required is a "meaningful education." If a student can get that by attending classes in English then he is not being deprived of his rights even if he is more proficient in other languages. The schools are never required to teach the native language, only to provide a program so that the students can learn English while not falling too far behind in the other subject areas. Therefore, it has been held in Serna and Keyes that bilingual programs are necessary. However, Serna clearly accepts the idea that these students should be brought up to a level of proficiency in English as rapidly as possible so that they can go into the same classes as the monolingual English student. What is envisioned is not a program designed to produce a bilingual

child, but instead a program which eases a child through the transition from one learning language into English as quickly as possible and which causes the smallest possible difficulty for the child in his other subjects. It is very important to remember that no one has been given the right to a bilingual education. Bilingual programs are only required as programs of language transition. The goal of the courts is to eliminate language as well as race as a tool of discrimination in the educational process. The method mandated is that the schools teach these children English so that they will be able to compete. In keeping with the goal of eliminating discrimination is the Serna court's requirement that bicultural programs be established in order that these children might have a positive self-image and feel more at home in the classroom.

Third, there may well be some difficult problems with implementation of these programs. Aspira sets some guidelines for determining which students ought to be eligible, but as the court observed, the standards put forth are but crude approximations. This is an area where continued litigation should be expected. This is particularly true in light of the Lau and Serna opinions which left open the possibility that the non-English-speaking population could be so small that its problems in education could be ignored. Since this numerical requirement has never been judicially determined, it is likely to recur as an excuse

for noncompliance. These two "loopholes" will probably go hand in hand with some school districts attempting to minimize the problem to the point where it can be ignored.

Another implementation problem will come in the area of hiring enough qualified teachers to handle these programs. In a period of declining student enrollment it will be a strain on school budgets to hire additional teachers. The alternative of replacing monolingual teachers with those that are bilingual is not politically attractive for many school boards. This latter plan is also likely to meet great resistance from the presently employed teachers. Some school districts, even after making a legitimate effort, may not be completely successful in meeting the court ordered standards, at least not for several years.

Fourth, it is going to be a major administrative task for the federal government to determine which districts are failing to meet the court ordered standards. Once again the situation is very similar to that of integration. It is worth recalling that the concept of separate but equal schools was discredited by the Supreme Court over twenty years ago, yet the fight to integrate the schools is far from complete. The courts hope that by setting examples other districts will voluntarily comply. This may happen. However, if past history in the field of minority rights is any indication, the struggle will be delayed. The principle may well be established, but the practice is not, and a

project of this size can be expected to take several years to implement under the best of conditions. As previously noted, it is unlikely that the best of conditions will apply to this situation. School districts which make at least a "paper effort" with some token implementation may go for some period of time without being detected, and even then may choose to fight it out in court, lengthening the process another two to three years at least.

This leads to a consideration of the fifth point of what the courts can do. The courts have provided only one method for enforcement, the withholding of federal aid. This is an extremely clumsy tool. It is a very lengthy remedy in that it requires many hearings and much justification. It hurts all of the students in the affected district without aiding those who are the victims in the first place. This remedy is only effective in a district that receives a significant amount of money from the federal government. If the district receives little or no money, or if the cost of complying with the requirement is greater than the amount received, a district might well choose not to comply. Thus, after many years of effort the attempt to bring bilingual education to a district might still end in frustration. Perhaps at that point the Supreme Court might decide to rule on the "equal protection" issue urged upon it in Lau. This, however, is a speculation which would require years of effort

and thousands of dollars to verify.

Bilingual Education and H.E.W.

One other group which has interpreted the Lau decision is the Department of Health, Education and Welfare. Through its Office for Civil Rights it has issued a set of guidelines for eliminating past educational practices rendered unlawful by Lau v. Nichols. Although H.E.W.'s guidelines do not have the binding legal force that a court opinion does, and can be challenged both administratively and through the courts, they are still entitled to much consideration. This is especially true since H.E.W. has been given the power of enforcing its guidelines by Congress in §602 of the 1964 Civil Rights Act, and this function was recognized and sanctioned by the Supreme Court in Lau v. Nichols. The courts will rely heavily on H.E.W.'s evaluation of proposed programs. After all, the courts are rarely experts in the field of education. They can say what the law requires, but must often call on other expertise to determine if the law is in fact being complied with and to determine if the proposed remedies will likely produce the results claimed for them. More than anything else these guidelines suggest the future of bilingual education. They also provide practical answers to some of the theoretical questions posed by the courts.

The guidelines require that all school children be evaluated by bilingual personnel who are competent in the child's non-English tongue. This evaluation is to determine the child's primary language and his language abilities in both English and the primary language. The school district must then diagnose the student's educational needs and prescribe a program of education designed to bring his performance up to the level of performance of a monolingual English-speaking student. This program must work within the context of the school as a whole. It cannot serve as an excuse for segregating the minority students. In this aspect the guidelines seem in conflict with the Keyes decision which allowed temporarily continued segregation for remedial purposes. This conflict cannot now be clearly resolved.

Having evaluated and diagnosed the student, the school must next enroll him/her in one of four types of programs: a Transitional Bilingual Education Program, a Bilingual/Bicultural Program, a Multilingual/Multicultural Program or an English as a Second Language Program. The last of these programs is only acceptable at the secondary school level and the others are to be chosen on the basis of the student's needs. At all times in all of these programs the goal is that the student participate in the regular curriculum to the greatest extent possible. The guidelines are, of course, much more specific than this, but, generally the greater the

student's ability to use English the more of his program must be offered in that language. If a student is bilingual and achieves at his/her grade level in English, the school is not required to provide additional educational programs.

In evaluating its overall performance, the school district must review all of its course offerings to make sure that they are not racially or ethnically identifiable. If some of them are, such identifiability must either be justified or eliminated. The personnel teaching and working with the students in these classes must be linguistically and culturally familiar with the student's background. The student/teacher ratio must be equal to or less than that for the district as a whole. However, if the number of students in such programs are no more than five greater per teacher than the student/teacher ratio for the district, then equality will be presumed and no corrective action will be taken. If this standard cannot be met, then an in-service training program will have to be instituted. The school must notify the students' parents, in both English and the parent's primary language, of the diagnosis and the prescribed course of study. Finally, periodic evaluations must be made to the Office of Civil Rights' regional office. These reports are to be made on a fixed time schedule and must include goals, methods, achievements and a timetable for expected accomplishments.

Abbreviated as this outline is, it should convey the general thrust of the H.E.W. guidelines. Just as do the court decisions, they stress that these programs are required only when the student cannot compete in English and would be better able to do so in his native language. The programs must be no more than transitional. At no point do the guidelines suggest that a goal is to produce a bilingual student. The H.E.W. guidelines do offer a practical answer to the question of how many students must be affected in order to bring the district under court scrutiny. The agency position is that such programs should be provided if only one student is affected, but for reasons of priority no action will be initiated if fewer than twenty students are involved. Certainly this could change, but considering the problems of investigating a situation where the number involved is so small, such a change is unlikely, and anyway the courts might finally decide that less than twenty meets their definition of too small a number with which to be concerned. Accordingly the guidelines of H.E.W. and the court decisions seem to agree.

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